



Our reference: FOIREQ18/00181

By email to: foi+request-4935-aa97bc32@righttoknow.org.au

Dear Mr Sweeney

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 4 November 2018.

Scope of your request

In your email you seek access to the following:

any documents in the possession of the Office of the Australian Information Commissioner that relate to the AFCA [Australian Financial Conduct Authority] and which would establish why the AFCA is not subject to the Freedom of Information Act 1982 (Cth).

Decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

I have decided to refuse your request for documents under s 24A of the FOI Act on the basis that all reasonable steps have been taken to find the documents you requested, but no such documents are held by the OAIC. My reasons for this decision are as follows.

Reasons for decision

Material taken into account

In making my decision, I have had regard to the following:

- your freedom of information requests dated 2 and 10 October 2018
- the FOI Act, in particular s 24A
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), specifically [3.85]-[3.91].
- searches conducted with the OAIC's Regulation and Strategy staff

Documents cannot be found or do not exist (s 24A)

I have refused your request for a document under s 24A of the FOI Act on the basis that no such documents exist.

Section 24A provides as follows:

Requests may be refused if documents cannot be found, do not exist or have not been received

Documents lost or non-existent

- (1) An agency or Minister may refuse a request for access to a document if:
 - (a) all reasonable steps have been taken to find the document;
and
 - (b) the agency or Minister is satisfied that the document:
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist

Searches undertaken

The FOI Guidelines state:

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management system and the practice of destruction or removal of documents
- the record management system in place
- the individuals within the agency who may be able to assist with the location of documents, and
- the age of the documents.¹

To find the documents you requested, I co-ordinated searches with the staff in the OAIC's Regulation and Strategy teams. This included the following staff:

- Assistant Commissioner, Regulation and Strategy

¹ FOI Guidelines [3.88] (footnotes omitted).

- Director, Regulation and Strategy (National Security, Telco, Finance, Enhanced Welfare Payment Integrity)
- Assistant Director, Regulation and Strategy

The team searched their emails, corporate record system and their computer desktops for AFCA and FOS related documents.

The team found documents about AFCA including the sentences 'It appears that AFCA will be an 'organisation' for the purposes of the Privacy Act' and 'AFCA will not be subject to the FOI Act'. However there were no documents why the AFCA is not subject to the FOI Act.

Conclusion

I am satisfied that there are no documents that fall within the scope of your request. Therefore, I refuse your request under s 24A of the FOI Act on the basis that no documents exist.

Your review rights are outlined on the following page.

Yours sincerely

Amanda Nowland
Senior Lawyer

30 November 2018

If you disagree with my decision

Internal review

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. An internal review will be conducted, to the extent possible, by an officer of the OAIC who was not involved in or consulted in the making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and state the grounds on which you consider that my decision should be reviewed.

Further Review

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal (AAT).

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (which can be an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, it is likely that the Information Commissioner will decide (under s 54W(b) of the FOI Act) not to undertake an IC review on the basis that it is desirable that my decision be considered by the AAT.

Section 57A of the FOI Act provides that, before you can apply to the AAT for review of an FOI decision, you must first have applied for IC review.

Applications for internal review or IC review can be submitted to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Alternatively, you may submit your application by email to FOIDR@oaic.gov.au or by fax on 02 9284 9666.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² See <https://www.oaic.gov.au/about-us/access-our-information/>.